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Mayor

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Public Hearing Date:	February 23, 2009
Zoning and Planning Action Date:	To be determined
Board of Aldermen Action Date:	To be determined
90-Day Expiration Date:	To be determined

DATE: February 20, 2009

TO: Alderman Brian E. Yates, Chairman, and
Members of the Zoning and Planning Committee

FROM: Michael Kruse, Director of Planning and Development
Jennifer Molinsky, Principal Planner/ Zoning and Planning Coordinator *JHM*

SUBJECT: **PUBLIC HEARING**
Petition #109-07(2) DIRECTOR OF PLANNING AND DEVELOPMENT
recommending that Chapter 30 of the revised Ordinances of Newton, 2007, be amended by deleting in the existing language of Sec. 30-5(b)(4) and replacing it with language requiring special permits for retaining walls exceeding four (4) feet in height; by adding Sec. 30-5(c) a requirement for the City Engineer's technical review; and, by adding to Sec. 30-1 new definitions for retaining wall and berm, and amending the existing definition for structure to include retaining walls.

CC: Board of Aldermen
Mayor David B. Cohen
Planning and Development Board
John Lojek, Commissioner of Inspectional Services
Tom Daley, Commissioner of Public Works
Lou Taverna, City Engineer
John Daghlion, Associate City Engineer
Marie Lawlor, Assistant City Solicitor

RECOMMENDATIONS: SEE "RECOMMENDATIONS" SECTION WITHIN.

The purpose of this memorandum is to provide the Board of Aldermen, Planning and Development Board, and the public with technical information and planning analysis which may be useful in the decision making process of the Boards. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Zoning and Planning Committee of the Board of Aldermen will consider in its discussion at a subsequent Working Session.

Petition #109-07, pertaining to the three foot grade change rule found in Section 30-5(b) of the City's Zoning Ordinance, was heard on January 28, 2008 and again on June 23, 2008 (this hearing was closed on September 8, 2008). Because ninety days elapsed after the closure of the last public hearing without action taken by the Board of Aldermen, the item is now being reheard as #109-07(2).

This memo summarizes information previously distributed to the Zoning and Planning Committee. Since the Committee's January 12, 2009 working session, there has been one change to the proposed zoning amendments: as requested by members of the Committee, the proposed language now includes an explicit statement that the Engineering Division (of the Public Works Department) and Inspectional Services Department may reject a proposed project based on concerns about runoff to abutting properties or erosion.

I. BACKGROUND

Section 30-5(b) currently states:

In all districts, unless the use is otherwise permitted as of right, the board of aldermen may grant a special permit ...to use land, buildings and structures for one or more of the following purposes:

...(4) The placement or removal of sod, loam, clay, gravel or stone, or other solid material, where the existing contours of the land are to be altered by more than three (3.0) feet, except when a special permit has been issued for construction under the terms of this ordinance.

This requirement may have been adopted to protect abutting properties from drainage problems caused by grade changes. However, Sec. 30-5(b) has subjected even modest grade changes to the full special permit procedure, with its attendant monetary and time costs. Some of these grade changes occur within the center of large lots where there are no drainage impacts on abutting lots or public streets.

At the same time, Commissioner of Inspectional Services' interpretations over the years have held that this provision is not applicable to foundation excavations or to excavations leading to garages under residences, resulting in some developers attempting to use this interpretation to justify major driveway and hillside excavations that have raised aesthetic as well as engineering concerns.

Given the various concerns associated with the "three foot grade change" requirement, it was included in the list of items addressed by the Zoning Task Force. The Task Force recommended deleting the requirement that any grade change of more than three feet obtain a special permit, amending the ordinance to ensure that retaining walls over five feet require a special permit if placed within a setback, moving the special permit granting authority for the retaining walls to the Zoning Board of Appeals (ZBA), and requiring technical reviews for construction or alteration of single- and two-family residences that would increase impervious surface by the lesser of 5% or 500 sq. ft. and for all other types of construction or alterations.

At its working session on November 10, 2008, the Zoning and Planning Committee directed the Planning Department to develop language to realize these changes, with the exception of the Task Force's recommendation to delegate special permit granting authority to the ZBA, and with the direction to consider a four foot high retaining wall rather than a five foot high wall as needing a special permit if located in a setback. In its working session on January 12, 2009, the Zoning and Planning Committee again directed the Planning Department to add language explicitly stating that project proposals may be rejected by the Engineering Division (of the Public Works Department) and Inspectional Services Department based on concerns about drainage or erosion.

Since some of the changes proposed by Petition #109-07(2) are related to other portions of the City's Zoning Ordinance, administrative policies currently in place within the Engineering Division and Inspectional Services Department, and the Commonwealth's Building Code, these existing policies are summarized in Section II below and proposed amendments (updated after the January 12, 2009 working session) are presented in Section III.

II. EXISTING REGULATIONS AND POLICIES RELATED TO GRADE CHANGES AND RETAINING WALLS

Besides Sec. 30-5(b)(4) of the City's Zoning Ordinance, there are other regulations and policies in place concerning grade changes. These include Sec. 30-5(c) of the Zoning Ordinance, the administrative policy of the Engineering Division and Inspectional Services Department, and the Commonwealth's newest building code.

A. Newton Zoning Ordinance Section 30-5(c)

The City's Zoning Ordinance currently requires that any changes to a property may not cause run-off or soil erosion that will impact abutting properties, and the Engineering Division of the Public Works Department (Engineering) and Inspectional Services Department (ISD) have policies in place that require property owners to obtain Engineering Division review and approval of drainage plans to ensure consistency with this portion of the Zoning Ordinance.

Current Zoning Ordinance states:

Sec. 30-5(c): In all districts, no land, buildings or structures shall be used except in conformance with the following:

- (1) Whenever the existing contours of the land are altered, the land shall be left in a usable condition, graded in a manner to prevent the erosion of soil and the alteration of the runoff of surface water to or from abutting properties, and shall be substantially landscaped;

On its own, the Planning Department believes that this section of the Zoning Ordinance ensures that grade changes or other changes on a property (e.g. retaining walls, additions to existing homes, new homes, etc.) may not cause drainage problems on abutting properties. "Abutting properties" include public rights of way, so Sec. 30-

5(c)(1) also protects city streets and sidewalks from run-off or erosion caused by changes on private property.

B. ISD/Engineering (Division) Policy

To ensure that Sec. 30-5(c) of the Zoning Ordinance is upheld, it is ISD and Engineering policy to require that building permit applications be reviewed by the City Engineer (or his designee) if they involve any of the following:

- Projects that increase impervious surfaces (through paving or new construction):
 - On lots under 10,000 sq. ft., additional impervious surface of 400 sq. ft. or more (equivalent to 4% of a 10,000 sq. ft. lot);
 - On lots 10,000 sq. ft. to 20,000 sq. ft., additional impervious surface of 600 sq. ft. or more (equivalent to between 3% and 6% of a lot);
 - On lots over 20,000 sq. ft., additional impervious surface of 800 sq. ft. or more (equivalent to 4% of a 20,000 sq. ft. lot);
- New water and sewer for 50% gutted buildings (built prior to 1970);
- Increases in total square footage of 1,000 sq.ft. or more (on buildings built prior to 1970);
- Condominium conversions;
- Any construction on non-conforming lots; and
- Retaining walls.

The Commissioner of Inspectional Services may, at his discretion, also send other projects to the City Engineer for review if drainage might be an issue.

C. New Building Regulations Regarding Grading

The newest edition of *Massachusetts State Building Code for One and Two Family Dwellings* (Seventh Edition, effective 2008) requires “grading permits” for grading associated with building or structure construction, reconstruction, repair, and demolition (Sec. 780 CMR 120.J103). The requirement does not preclude municipalities from further regulating grade changes, and indeed, as the Building Code applies only to grading associated with the construction of a building/structure, does not cover all instances of grade changes that the City may wish to address. Nonetheless, it offers additional oversight of grade changes in cases of construction of buildings and structures.

As in previous editions, the State Building Code also requires building permits for retaining walls of four feet or more.

III. PROPOSED ZONING AMENDMENTS/ RECOMMENDATIONS

The Planning Department recommends the following zoning text amendments:

1. **Remove the three-foot grade change provision and require technical review for increases in impervious surfaces and other projects that may impact neighboring properties or city property.**

The current Zoning Ordinance, under Sec. 30-5(c), deals with drainage concerns caused by retaining walls, grade changes, and other construction. Removing 30-5(b)(4), the three-foot grade change requirement, in our opinion, should not hinder the City's ability to regulate projects that might cause drainage or erosion problems for abutters.

➤ ***Recommendation: Delete existing language in Sec. 30-5(b)(4).***

Although it is Inspectional Services Department and Engineering (Division) policy to review grade changes, retaining walls, and other increases to impervious surfaces to ensure compliance with Sec. 30-5(c), the petition seeks to amend the Zoning Ordinance to make this clear. For increases in impervious area, the Planning Department recommends requiring review at a threshold similar to current Inspectional Services Department and Engineering Division policy: the lesser of four percent of lot size or 400 sq. ft. (**Petition #109-07 recommended the lesser of five percent of lot size or 500 sq. ft.**). It should be noted that current Inspectional Services Department and Engineering Division policy does not require a review of impervious surface increases less than 400 sq. ft. on any property; the proposed language below would provide no minimum in terms of square feet, though the Committee may wish to consider this option.

➤ ***Recommendation: Amend Sec. 30-5(c) to add a requirement for City Engineer technical review (proposed text shown underlined; highlighted text represents changes made after the January 12, 2009 working session of the Zoning and Planning Committee):***

Sec. 30-5(c): In all districts, no land, buildings or structures shall be used except in conformance with the following:

- (1) Whenever the existing contours of the land are altered, the land shall be left in a usable condition, graded in a manner to prevent the erosion of soil and the alteration of the runoff of surface water to or from abutting properties, and shall be substantially landscaped. Projects increasing impervious surface area by more than the lesser of a) four (4.0) percent of lot size or b) four hundred (400) square feet, or that involve altering the landscape in such a way that may result in alteration of the runoff of surface water to abutting properties or erosion of soil on abutting properties, shall be reviewed by the Commissioner of Inspectional Services and the City Engineer to ensure compliance with this section. The Commissioner of Inspectional Services and the City Engineer may reject a project if they believe it will cause runoff of surface water to or from abutting properties or the erosion of soil.

2. Require a special permit for retaining walls of a certain height if placed in setbacks.

As petition #109-7 originally proposed, retaining walls built in setbacks deserve greater scrutiny because of their proximity to abutting neighbors and public rights-of-way. The current proposal is for retaining walls of four feet or less to be allowed in setbacks as-of-right, but pending Inspectional Services Department and Engineering Division technical review as described above, while retaining walls over four feet would be allowed in setbacks only by special permit.

There are several changes needed to the City's Zoning Ordinance to require special permits for retaining walls over four feet if placed in the setback. First, the Planning Department proposes replacing the deleted three-foot grade change language in Sec. 30-5(b)(4) with language explicitly requiring a special permit for a retaining wall of a certain height if placed within a setback. Second, retaining walls of a certain height must be defined as "structures" to ensure that they are not permitted in setbacks as-of-right. Finally, to ensure that terraced systems of low walls or berms are not used to avoid the special permit requirement, we propose adding definitions of "retaining wall" and "berm" as well that includes these concerns.

The Planning Department finds no engineering rationale for choosing four or five feet as the "trigger" height for a special permit. However, for aesthetic reasons and because four feet is the height at which a professional engineer is needed for design of a retaining wall, four feet may be desirable, and is used in the suggested language below.

➤ ***Recommendation: Replace deleted Sec. 30-5(b)(4) with language requiring special permits for retaining walls over a certain height in setbacks:***

30-5(b) In all districts, unless the use is otherwise permitted as-of-right, the board of aldermen may grant a special permit to use land, buildings and structures for one or more of the following purposes:

...(4) The placement of a retaining wall exceeding four (4.0) feet in height, as measured from the foot of the wall to its highest point, within a setback.

➤ ***Recommendation: Amend definitions of "structure" in Sec. 30-1:***

Structure: Any construction, erection, assemblage or other combination of materials at a fixed location upon the land, such as, but not limited to a building, bridge, trestle, tower, framework, tank, tunnel, tent, stadium, platform, retaining wall or system of walls whose above-grade height exceeds four (4.0) feet, tennis court or swimming pool.

➤ ***Recommendation: Add definitions of “retaining wall” and “berm” to Sec. 30-1:***

Retaining wall: A wall or terraced combination of walls to hold a mass of earth material at a higher position. When a combination of walls is placed within a setback, height is to be measured from the foot of the lowest wall to the top of the highest wall. For the purposes of this ordinance, a berm with a slope of 1:1 or greater is to be considered a retaining wall.

Berm: A mound of earth used for decorative, screening, or buffering purposes.

Together, these proposed amendments would ensure that a retaining wall over four feet would require a special permit if located within a setback; ensure that systems of terraced walls could not be used to circumvent this requirement; and formalize the technical review already occurring by the Inspectional Services Department and Engineering Division (of the Public Works Department) for increases in impervious surface area and other projects that may impact drainage on abutting properties.

